Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR LIMITED STAY OF TRANSFORMATION ORDER YEARS 6 AND 7 ICC TRANSITION – AS IT IMPACTS A SUBSET OF TANDEM SWITCHING AND TRANSPORT CHARGES

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I. INTRODUCTION AND SUMMARY

CenturyLink, Inc. by and on behalf of its subsidiaries ("CenturyLink") hereby requests a stay of a single component of the intercarrier compensation (ICC) reform transition adopted in the Commission's 2011 *Transformation Order*[1] – pursuant to Sections 1.41 and 1.43 of the Commission's rules.[2]

[1] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform - Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161,

Specifically, CenturyLink seeks a stay of the Years 6 and 7 transitions called for in Sections 51.907(g) and 51.907(h) regarding just a subset of the industry's tandem switching and transport charges.[3] As described more fully below, if this stage of the ICC transition is not suspended there will likely be a confusing morass as carriers take a variety of different approaches to the Section 51.907(g) requirements in the Year 6 annual tariff filing process that begins June 16, 2017. Additionally, there will be irreversible competitive harm in Years 6/7 and beyond and arbitrage schemes that have already been launched in anticipation of this transition will only expand.

CenturyLink's request is supported by Commission rules and precedents and is in the public interest. As described more fully below, industry members were advised, in informal communications with Commission staff related to their upcoming 2017 annual tariff filings, of

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26 FCC Rcd 17663 (2011) (*Transformation Order* and *FNPRM)* (subsequent history omitted), *aff'd sub nom., In re: FCC 11-161*, Nos. 11-9900, *et al.*, 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied,* Orders, Aug. 27, 2014, *cert. denied*, 135 S. Ct. 2072, May 4, 2015 (Nos. 14-610, *et al*.).

[2] 47 C.F.R. §§ 1.41, 1.43; *see also* 47 C.F.R. §§ 1.44(e), 1.45(d) and (e), and 1.298. As described herein, the context of this filing is unusual as it addresses concerns now expected to arise out of tariffs filed in the upcoming 2017 annual tariff filing process in which an estimated hundreds of carriers must simultaneously file tariffs implementing complex rules adopted in the *Transformation Order* – based on very recent guidance given informally in the tariff filing process. The substance of this stay petition also demonstrates the basis for a potential future legal challenge on the merits of the interpretation question described herein that CenturyLink currently anticipates filing – possibly via challenges to future tariff filings, a declaratory ruling petition, or a petition for reconsideration (*see e.g.*, *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, 12360 ¶ 132 (2000) (recognizing the Commission's ability to accept such petitions after the customary 30-day period where substantial reasons are demonstrated such as new facts or a party's lack of notice of the action at issue). But, CenturyLink's substantive challenge is likely premature in these unusual circumstances and, in all events, must be presented in a separate pleading from this stay request. 47 C.F.R. § 1.44(e).

[3] 47 C.F.R. §§ 51.907(g), 51.907(h). This stay request does not impact the other aspects of the Year 6 transition that are unrelated to tandem switching and transport charges – that is, the completion of the transition of end office charges to bill and keep.

certain expectations regarding those filings. And, as a result of what was learned, there is likely to be:

- Considerable potential for debate, disagreement and confusion regarding how to shape 2017 annual tariff filings;
- Substantial legal challenges as to the stated expectations for those filings;
- Resulting significant and extensive implementation and "re-implementation costs" imposed on the Commission as well as on industry and consumers once the right answers are sorted out.
- Regardless of the ultimate result, establishment of a fundamental asymmetry in ICC treatment that will lead to irreversible competitive harm.
- Damaging market inefficiencies and arbitrage – harms that cannot be undone at a later date.

These circumstances easily demonstrate satisfaction of the Commission's customary legal standard for grant of a stay.

As is also explained below, a grant of this request will also best facilitate the Commission's broader intercarrier compensation (ICC) reform effort and as part of that, the IP transition. When it comes to addressing the broader ICC reform issues that remain pending in the Commission's ICC portion of the *Transformation Order FNPRM* docket,[4] a central and overarching goal must be a competitive market where all providers can compete under the same rules with a minimum or arbitrage and administrative inefficiency.[5]

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[4] *See*, n. 1, *supra*.

[5] *See also* CenturyLink Opposition/Comments to AT&T Forbearance Petition, WC Docket No. 16-363, *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges* (Dec. 2, 2016), pp. 8-9 (discussing the variety of important concerns that need to be attended-to when looking for solutions to the *Transformation Order FNPRM* issues, including: that any reform of originating access charges must account for the reality that originating access functionality is distinct from terminating access functionality; the need to ensure an adequate recovery mechanism in connection with any further reform; the open issues regarding the future treatment of common and dedicated transport access elements and other access service elements,

II. BACKGROUND

In Years 1 (2012) and 2 (2013) of the ICC transition rules adopted in the *Transformation Order*, carriers moved many terminating intrastate and interstate access and non-access rates into parity.[6]

In Years 3-5 (2014-2016), terminating end office rates were reduced to $0.0007 in three steps.[7]

The Commission's rules now anticipate that, in Year 6 (2017), terminating end office rates are to be moved permanently to zero.[8]

Additionally, a subset of tandem switching and transport rates are expected to move to $0.0007 in Year 6 and then to zero in Year 7 (2018).[9] Price cap carrier and rate of return carrier tandem switching and transport rates were capped immediately by the *Transformation Order* and higher intrastate rates for these services were moved to parity with interstate rates in Years 1 and 2.[10] And, the *Transformation Order* and Commission rules anticipated that rates for tandem switching and transport rates would not be further impacted by Years 3-5.[11] But, as noted, rates for a subset of these terminating access services, when provided by price cap carriers, move to $0.0007 in Year 6 and then to zero in Year 7.

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the network edge and points of interconnection, the role of agreements and tariffs, and ensuring that LECs have adequate flexibility when it comes to end-user charges must all be carefully addressed); Erratum (to p. 4 of the CenturyLink Opposition/Comments), WC Docket No. 16-363 (Feb. 10, 2017).

[6] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(b) and (c).

[7] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(d)-(f).

[8] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. § 51.907(g).

[9] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(g) and (h).

[10] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(a)-(c).

[11] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(d) through (e).

It is also noteworthy that, contemporaneous with the *Transformation Order,* the Commission issued a Further Notice of Proposed Rulemaking (*Transformation Order FNPRM*) in which it raised questions regarding the future status of tandem services more comprehensively.[12] However, five and a half years later, those issues have not been resolved.

At the same time, significant debate has arisen within the industry about what subset of tandem switching and transport rates are subject to the Years 6 and 7 transition to bill and keep. This is largely because the *Transformation Order* states that the Years 6/7 bill and keep transition applies: "(1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier does not own the tandem serving switch."[13] But, the Commission's rules define a potentially different scope of services. Specifically, Rule 51.907(g)(2) states that the Year 6 transition step to $0.0007 applies to "terminating traffic traversing a tandem switch that the terminating carrier *or its affiliates* owns…" (emphasis added).[14] And, Rule 51.907(h) specifies that the Year 7 transition step to zero applies to "charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier *or its affiliate* owns." (emphasis added).[15] Nowhere in the *Transformation Order* or rules does the Commission define what "affiliates" are referred to in this language.

[12] *Transformation Order*, 26 FCC Rcd at 17934 ¶ 801 (describing intent to provide rate-of-return carriers "additional time to transition as appropriate[]" their tandem transport and termination charges), 17943 ¶¶ 819-20 (discussing need to address further reform for rate of return tandem transport rates and tandem transport rates more broadly via the *Transformation Order FNPRM*), 18112-15 ¶¶ 1306-13 (raising issues in *Transformation Order FNPRM* re: tandem transport and termination not "fully address[ed]" by *Transformation Order* as well as future status of intermediate network services more broadly).

[13] *Transformation Order*, 26 FCC Rcd at 18112 ¶ 1306 and n. 2358 (internal reference omitted).

[14] 47 C.F.R. § 51.907(g).

[15] 47 C.F.R. § 51.907(h).

Because of these ambiguities and contradictions, carriers have had a number of discussions within customary industry discussion groups formed to assist carriers as they anticipate the complexities associated with their annual tariff filings and those groups have reached-out to Commission staff, as is customary, for related guidance.[16] Just recently, the industry was advised, in informal communications with Commission staff, that the Commission's expectation is that 2017 annual tariff filings would reflect the following principles:

- Tandem switching and transport rates are *not* intended to be moved to bill and keep in Years 6/7 for call flows where the price cap carrier owns the tandem but neither it nor an affiliate own the end office (hereafter "Terminating Tandem To Third Party" service).

- These rates as applicable to call flows where the price cap carrier is the terminating carrier (i.e. it owns the end office) and it also owns the tandem are intended to be moved to bill and keep in Years 6/7 (hereafter "Terminating Tandem To End Office" service).

- These rates as applicable to call flows where the tandem is owned by a price cap carrier and the end office is owned by another price cap carrier that is affiliated – i.e. owned by the same holding company – are also considered Terminating Tandem to End Office service (and transition to bill and keep). However, as applicable to call flows where the tandem is owned by a price cap carrier and the end office is owned by an affiliated CMRS carrier or CLEC, the rates are considered Terminating Tandem to Third Party service (and do not transition to bill and keep).

- If a rate of return ILEC owns the tandem, no tandem charges, in any call flows, move to bill and keep – since the rate of return ILEC, unlike the price cap ILEC rules, leave tandem services untouched in Years 6/7.

[16] Questions around requirements for individual company annual tariff filings are typically resolved, under current practices and the express direction of the Commission's rules, via discussions between industry groups such as the Price Cap Implementation Forum and Commission staff from the Wireline Competition Bureau. *See, e.g.*, 47 C.F.R. § 0.91(k) (the functions of the Wireline Competition Bureau include "…[i]nteract with the public,…and industry groups on wireline telecommunications regulation and related matters."); 47 C.F.R. § 1.1204(b)(3)(exempting communications to and from Commission personnel relating to tariff proceedings before being set for investigation from Commission ex parte rules).

Given this direction, there is now considerable potential for debate and disagreement regarding how the conclusions described above for price cap ILECs and rate of return ILECs carry-over (by virtue of the CLEC benchmark rule)[17] to the variety of potential call flows where a CLEC might own the tandem. It would seem clear that, where a price cap ILEC is the applicable CLEC benchmark, and a single CLEC entity owns both the tandem and end office in a given call flow, the applicable rates will move to zero in Years 6/7. Similarly, it would seem clear that rates are not impacted for traffic terminated via a CLEC-owned tandem and an un-affiliated entity of any type owns the end office. And, where a rate of return ILEC is the applicable benchmark, it would seem that the rules are the same as described above for rate of return ILECs – no tandem charges, in any call flows, move to zero.

But, since the *Transformation Order* and the Commission's rules fail to define "affiliate," even the conclusions above are likely to be subject to debate and confusion. This is particularly true where there is no written guidance that carriers can follow.

And, even if there were complete agreement about the above aspects of CLEC tandem charges, there are other complexities that are likely to lead to further confusion. For example, where a price cap ILEC is the applicable benchmark, it would seem to follow from the affiliate rule described above that rates also move to zero when a call terminates to a CLEC tandem and an end office owned by another, affiliated CLEC. Similarly, it would also seem to follow that rates do not move to zero for traffic terminated via a CLEC-owned tandem where an affiliated CMRS carrier or ILEC owns the end office. But, it is doubtful that the CLEC industry will uniformly implement those complex requirements. For many of them, this filing may be the first occasion they have had to consider these issues.

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[17] 47 C.F.R. § 61.26.

Moreover, regardless of how these debates regarding the proper application of the CLEC benchmark rule are resolved, these guidelines lead to fundamental asymmetry in ICC treatment that will lead to irreversible competitive harm. An approach where the transition to bill and keep applies to tandem services in some contexts but the identical service is not subject to the transition in other contexts leads to obvious market inefficiencies and disincentivizes investment. These same competitive harms will follow where the transition to zero applies to tandem services provided when the tandem owner and the end office owner are affiliated and are one type of carrier, but not when they are affiliated and are another type of carrier.

Such asymmetry also leads, as night follows day, to damaging market inefficiencies and arbitrage – harms that cannot be undone at a later date.

Finally, legal challenge is also inevitable as the expected interpretation, if it manifests, would be arguably arbitrary and capricious since it, arguably without any basis in the rules or adopting order and contrary to the plain meaning of the rule language, would adopt a view that "affiliates" means just one type of affiliate.

III. GRANT OF THIS LIMITED STAY REQUEST IS IN THE PUBLIC INTEREST

A stay of the Years 6 and 7 transitions called for in Sections 51.907(g) and 51.907(h) regarding a subset of tandem switching and transport charges will avoid these problems and merely preserve the status quo while the Commission more carefully considers unintended consequences. This is critical for all the reasons described above – but also because the compensation exchanged between carriers impacts whether and how investment will occur for such intermediate network services – both currently and in IP networks of the future.

A fundamental policy underpinning of the Commission's adoption of the ICC reform transition reflected in the *Transformation Order* and the resulting rules was the Commission's desire to eliminate the confusing market signals and other competitive harm and the variety of arbitrage schemes that result when there is disparity in rates for identical services.[18] Yet, this is exactly what will result should the Years 6/7 transition as envisioned by the Commission be allowed to come into effect.

To begin with, there will be massive confusion in the annual tariff filing process for price cap ILECs and, perhaps even more so, for CLECs when they follow-up on July 16, 2017 with attempts to conform their filings. This will inevitably lead to a huge drain of industry and Commission resources as an estimated hundreds and hundreds of tariff filings must be reviewed for compliance with the complex guidelines described above. This does not account for the estimated thousands of state tariff filings and the multitude of supporting systems changes and related calculations of end-user charges, etc. that must accompany and conform with these disparate approaches in FCC tariff filings. And, given the complexities and potential for confusion, there are likely to be a high number of billing disputes – leading to a further drain on industry and FCC resources alike. Unless a stay is granted, these issues will likely have to be worked-out via the Commission's tariff challenge and investigation processes – which are not well-suited to resolving issues of this magnitude and complexity.

Moreover, even assuming the initial Year 6 chaos is resolved and a uniform approach is ultimately accomplished, the result will only be significant and extensive "re-implementation costs" for the industry and consumers once the right answers (since there can and should be only one right answer to each of the various interpretation questions implicated) are sorted out.

And, even putting this harm aside, the result will, as noted above, only be a cementing of an asymmetrical ICC approach to tandem switching and transport where identical services will be compensable via charges to IXCs depending solely on the type of carrier involved or the type

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[18] *Transformation Order*, 26 FCC Rcd at 17929-30 ¶¶ 790-92.

of affiliation that may exist between the tandem owner and end office owner. Among other things, this will create the perverse result whereby the majority of traffic terminated to CMRS providers, will continue to be subject to tandem access charges while other traffic flows will not. Specifically, this result will occur because the IXC traffic will be terminated to the CMRS provider via tandems owned by affiliated price cap carriers. In other words, price cap carriers with wireless affiliates will continue to recover access charges from IXCs when terminating traffic to those affiliates, but price cap carriers with price cap ILEC affiliates will not recover access charges from IXCs when terminating traffic to those affiliates. This creates a clear, unequal competitive position when it comes to managing such assets as networks continue to evolve.   It also creates unfair results for consumers/end users – since end users of some end office owners will be forced to carry the cost of tandem services while IXCs will incur the costs for such services for other end office owners.

For other traffic, similar inequities will occur because CMRS providers have entered into unlawful conduct by which they refuse to allow direct connections for certain traffic and instead force IXCs to use the tandem facilities of independent tandem owners while contracting to receive a share of the tandem owner's tandem access charge revenue. Even when the Commission's enforcement authority catches-up with this unlawful activity, other forms of arbitrage will emerge – leading to the endless game of "whack a mole" that inevitably follows when irrational rate disparity is put in place and arbitrage constantly moves around until it is detected and prosecuted. And, in the meantime, this type of conduct will be encouraged by an asymmetric ICC transition approach like that outlined above.

In addition to these problems, the subjecting of just one subset of tandem services (that of price cap ILECs) to zero rating will inevitably lead to a migration of traffic that is currently routed over direct end office trunks to tandems. This will further increase the burden on those tandem facilities while simultaneously depriving price cap ILECs of the ability to derive revenue that might be used to meet the new capacity needs and prevent tandem exhaust. ILEC networks and tandems are not prepared for large shifts of traffic. Moreover, the complete exclusion of tandems owned by rate of return ILECs creates another context ripe for arbitrage. While the *Transformation Order* intentionally decided not to address rate of return ILEC reform as fully as it did price cap ILEC reform, it was not envisioned that this necessarily meant that that reform would still remain fixed six years later. Finally, the Commission has not yet addressed the questions around "edge" definition that are teed-up in the as-yet-unresolved *Transformation Order FNPRM*. Thus, the Commission has also not yet put in place measures discussed there – such as the need to accompany an edge definition with restrictions of such migration (for example, requiring direct end office connection at certain traffic volume levels).[19] At a minimum, this must be accomplished before the Commission effectively establishes the edge at the tandem for any category of services.

As noted above, there is also the significant prospect of a successful legal challenge.

A stay by the Commission will, at least temporarily, stave off many of these problems and permit the Commission to more carefully consider the best ICC approach to appropriately deal with the entire suite of tandem services at this point in time. Clearly, the full impact of a transition of even a subset of price cap tandem transport services to bill and keep in Years 6 and 7 was not adequately considered by the Commission in the *Transformation Order*. Indeed, the Commission could not have anticipated the market changes and arbitrage schemes that have emerged since 2011. Given this, the best approach at this point in time is to suspend any further

[19] *Transformation Order FNPRM*, 26 FCC Rcd at 18115-20 ¶¶ 1315-25.

transition for those tandem services until those impacts can be weighed. Grant of this stay request will merely preserve the status quo while the Commission addresses these fundamental concerns.

This approach will also best facilitate the Commission's work to address the broader ICC reform issues that remain pending in the Commission's ICC portion of the *Transformation Order FNPRM* docket[20] and, as part of that, the IP transition. There will continue to be a need for robust investment in intermediate network services in IP networks. In CenturyLink's view, there are two essential ingredients to ensuring such investment:

> (1) Allowing all tandem providers (and providers of functionally equivalent intermediate IP network services) to exist and to compete equally. It should not matter that those intermediate carrier services are provided by a price cap ILEC, an affiliated entity or an independent provider.[21] Each provides the same value and the presence of each fosters competition. Arbitrary line-drawing that precludes some such providers, but not others, to charge for the same functionality only leads to arbitrage.
>
> (2) Ensuring that terminating carriers have the obligation to offer direct termination if requested. Competitive intermediate network services can only be accomplished now and with IP networks if IXCs have the ability to avoid these metered tandem charges when traffic volumes warrant such direct connections.

If these ingredients are assured, the market will do the rest and ensure that rates and practices remain reasonable and competitive. Conversely, reducing tandem/transport rates for some carriers and not others in Years 6/7 has the result of defining network edge rules and tandem cost recovery in a way that could be precedent setting as the industry transitions away from TDM to

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[20] *See* n. 5, *supra*.

[21] This approach also reflects the fact that, even if a broad interpretation of affiliate is used when transitioning tandem and end office arrangements by affiliated entities to zero, the Commission would still eliminate the incentive for investment in intermediate network services in just some types of configurations (i.e. based on an affiliate relationships), which will lead to arbitrage and inefficiencies.

IP networks. The Commission should allow all tandem owners to be compensated as opposed to picking certain call flows over others to receive continued ICC recovery.

Even if the Commission's ultimate approach to intermediate services differs from this approach, a grant of this stay request will at least ensure that the Commission does not prematurely cement in place a disparate treatment of these services based on arbitrary distinctions – a result that will start to be planted in arrangements for IP services.

For all of these reasons, the best approach at this point in time is to suspend any further transition for tandem switching and transport services until the full impact of a transition of even a subset of price cap tandem transport services to bill and keep in Years 6/7 can be adequately considered by the Commission. Good cause exists and the public interest would be served by granting this stay request. The circumstances described above also easily demonstrate satisfaction of the Commission's customary legal standard for grant of a stay: (i) that the petitioner has a substantial prospect of prevailing on the merits; (ii) irreparable injury will otherwise occur, due to the unavailability of an adequate legal remedy; (iii) the threatened injury outweighs any possible injury to the opposing party; and (iv) issuing a stay will not disserve the public interest.[22]

[22] *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir 1958).

IV. CONCLUSION

For the foregoing reasons, CenturyLink respectfully submits that this limited stay request should be granted.

Respectfully submitted,

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